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## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1124

ALBERT MILLER, MAX MILLER, AND ISIDORE SCARBNICK, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the circuit court of appeals (R. 122–125) is reported in 125 F. (2d) 517.

### JURISDICTION

The judgment of the circuit court of appeals was entered February 5, 1942 (R. 121) and the petition for rehearing (R. 127–128) was denied March 10, 1942 (R. 129). The petition for a writ of certiorari was filed April 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. 6). See also Rule XI

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

### QUESTION PRESENTED

Whether the fraudulent concealment of assets from a bankruptcy receiver prior to the time required by statute or by order of court for disclosure of assets, constitutes a crime against the United States.

### STATUTORY PROVISIONS INVOLVED

At the time the offenses herein were committed, Section 29b of the Bankruptcy Act (11 U. S. C., 52b) provided:

> A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any proceeding under this title, any property belonging to the estate of a bankrupt; * * *.

and Section 7 of the Bankruptcy Act (11 U. S. C. 25) provided:

> a. The bankrupt shall * * * (8) prepare, make oath to, and file in court within ten days after adjudication, if an involuntary bankrupt * * * a schedule of his property * * *.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

**STATEMENT**

Petitioners were convicted[1] (R. 74) in the District Court of the United States for the Eastern District of Michigan upon both counts of an indictment (R. 1–6) charging in count 1 a conspiracy, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), to conceal assets from a receiver in bankruptcy, and in count 2 a concealment of assets on April 18, 1938, from a receiver in bankruptcy, in violation of Section 29b of the Bankruptcy Act (11 U. S. C. 52b).

Petitioners Max Miller (R. 75–76) and Albert E. Miller (R. 77–78) were sentenced to imprison-

[1] Petitioners were jointly indicted with the Alaska Smoked Fish Company, Inc., William J. Smith and Arthur Kaplan (R. 1–2). Smith and Kaplan were acquitted on both counts and the corporation was found guilty only on count 1 (R. 74). Petitioners Max Miller and Isidore Scarbnick were alleged to be the president and treasurer, respectively, of the corporate defendant (R. 3).

ment for two years on count 1 and two years and six months on count 2, to run concurrently, and to pay fines of $1,500 and $500, respectively. Petitioner Isidore Scarbnick was sentenced (R. 79–80) to imprisonment for one year and six months on each of counts 1 and 2, to run concurrently, and to pay a fine of $500. Their convictions were affirmed by the Circuit Court of Appeals for the Sixth Circuit (R. 121–125).

It appears from the indictment (R. 2–6) that in February of 1938 the petitioners rented a vacant store in the City of Detroit under an assumed name, and there concealed large quantities of staple groceries which belonged to the Alaska Smoked Fish Company, Inc. On April 15, 1938, an involuntary petition in bankruptcy was filed against the corporation and a receiver was appointed and duly qualified on April 18, 1938. Thereafter, on April 29, 1938, the groceries were discovered and turned over to the possession of the receiver by third persons. On May 2, 1938, the Company was adjudicated a bankrupt.

## ARGUMENT

Petitioners state (Pet. 2) that "the only question involved is the sufficiency of the indictment to charge an offense," but "do not argue that the indictment is insufficient because of any omissions, or dangers of a second prosecution" (Pet. 22).[2]

[2] The sufficiency of the indictment was challenged by a motion to quash (R. 7–10) and by a motion for a directed

They contend that where there is a concealment of assets prior to the bankruptcy proceedings, the continuance of the concealment after the appointment of a receiver does not come within the ambit of Section 29b, paragraph (1), of the Bankruptcy Act until, under the terms of the statute, or by order of court, there arises a duty to disclose the assets (Pet. 8, 12–13, 16–19, 21–22).[3]

Count 2, the count devoted to the substantive offense, charged, however, that after the filing of the petition in bankruptcy the defendants on April 18, 1938, the day upon which the receiver was appointed and qualified, "did unlawfully, wilfully, and fraudulently conceal," from the receiver certain designated assets of the bankrupt estate of the corporate defendant (R. 5–6). And count 1, the conspiracy count, alleged that the defendants "unlawfully, wilfully, feloniously, knowingly and fraudulently" conspired that they would conceal from the receiver the assets in question, "all of which property should have been surrendered to the

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verdict (R. 14–17), both of which were denied (R. 10–11, 13). The defect here urged by the petitioners was not raised in either of those motions, however, and is not discussed in the opinion of the circuit court of appeals. Petitioners assert (Pet. 22) "We fear the point we make was misunderstood, and for that reason (we sincerely submit) not answered in the opinion below."

[3] They allege that disclosure was not required until May 12, 1938, when the schedule of assets required of the bankrupt was due (Pet. 18, 22).

possession of the receiver, Henry C. McVeigh, who had been appointed receiver * * * on the 18th day of April, 1938, and who did qualify as receiver on the same day * * *."[4] The receiver was, of course, appointed by the bankruptcy court to take over the property of the corporation, and it is settled that "if the concealment began before a trustee or other officer was entitled to possession of the property concealed, and continued until that time, the bankrupt would then become criminally liable." *United States* v. *Trotter,* 8 F. Supp. 275, 276 (S. D. Ala.); *Arine* v. *United States,* 10 F. (2d) 778, 779 (C. C. A. 9); *Reinstein* v. *United States,* 282 Fed. 214, 216 (C. C. A. 2), certiorari denied, 260 U. S. 722; *Kaufman* v. *United States,* 212 Fed. 613, 618 (C. C. A. 2); *In re Brincat,* 233 Fed. 811, 816 (S. D. Ala.). Petitioners admit (Pet. 13–14) that these authorities support the validity of the indictment but rely upon *Gerson* v. *United States,* 25 F. (2d) 49 (C. C. A. 8), as being in conflict (Pet. 18–19). In that case, however, which involved the sufficiency of an overt act, the court said (pp. 55), that

> This overt act is the continuous concealment of property from the trustee, and while plaintiffs in error insist that this is a mere

[4] Since the evidence is not included in the record, it must be assumed that it sustained these charges. See *Dealy* v. *United States,* 152 U. S. 538, 542.

> passive act and therefore cannot constitute an overt act, we think it must be true that a continuous and intended concealment from the trustee of property belonging to the estate in bankruptcy, even though the actual concealment of the property took place before the appointment of the trustee, is sufficient as an overt act.

Also, it should be observed that count 2 does not incorporate by reference the allegations in count 1 with reference to a "prior" continuing concealment. Petitioners may not interpolate into count 2 the facts showing the prior concealment alleged in count 1, for, in the absence of a specific reference, "each count must be treated as a whole" (*Hood* v. *United States*, 43 F. (2d) 353, 354 (C. C. A. 10)) and "as if it was a separate indictment." *Dunn* v. *United States*, 284 U. S. 390, 393. Count 2 charges all the elements of the offense substantially in the language of the statute and apprises the accused fully as to the nature of the accusation against him, which is all that is required. *United States* v. *Simmons*, 96 U. S. 360, 362; *May* v. *United States*, 199 Fed. 42, 46–47 (C. C. A. 8) and authorities therein cited.

## CONCLUSION

The decision below is correct and there is involved no conflict of decisions. We therefore

respectfully submit that the petition for a writ of certiorari should be denied.

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